Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TEXACO INC. AND TEXACO EXPLORATION AND PRODUCTION INC.
Petitioners

VERSUS

PAUL WILLIAMS AND HARRISON ELLENDER
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit engaged in "judicial legislation," prohibited by this Court in areas where Congress has spoken, when it denied a vessel owner the concursus proceeding mandated in an action filed under the Limitation of Vessel Owner's Liability Act, 46 U.S.C. §181, et seq, thereby rendering a decision in direct conflict with the statute, Supplemental Admiralty Rule F, Supreme Court precedents, and its own appellate precedents.

2. Whether the Fifth Circuit's decision correctly resolved the "recurring and inherent conflict" between the exclusive jurisdiction vested in an admiralty court by the Limitation of Vessel Owner's Liability Act, 46 U.S.C. §181, et seq, and the common law remedies embodied in the Saving to Suitors Clause of 28 U.S.C. §1333 when it abdicated the exclusive jurisdiction of an admiralty court to state courts.

LISTING OF ALL PARTIES TO THIS PROCEEDING

1. Texaco Inc., Petitioner

2. Texaco Exploration and Production Inc., Petitioner

3. Harrison Ellender, Respondent

4. Paul Williams, Respondent

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   Counsel for Respondent Paul Williams

RULE 29.1 STATEMENT

Petitioner Texaco Inc. is the parent of Petitioner Texaco Exploration and Production Inc. Texaco Inc. has no parent. Texaco Exploration and Production Inc. is not publicly traded. The subsidiaries of Texaco Inc. that are publicly traded are Texaco Canada Petroleum, Inc. and Texaco Nigeria P.L.C.

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PAUL WILLIAMS AND HARRISON ELLENDER
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texaco Inc. and Texaco Exploration and Production Inc. respectfully petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the Judgment of the Fifth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is reported as Matter of Texaco Inc.,

847 F.Supp. 457 (E.D.La. 1994), and is reproduced herein at Appendix A-1.

The opinion of the United States Court of Appeals for the Fifth Circuit is published as Texaco Inc. v. Williams, 47 F.3d 765 (5th Cir. 1995), and is reproduced herein in Appendix B-1.

Texaco Inc. and Texaco Exploration and Production Inc. filed a Petition for Rehearing En Banc, which was treated as a Petition for Panel Rehearing by the Fifth Circuit, and which was denied on April 25, 1995. This opinion is not officially reported but is reproduced herein at Appendix C-1.

JURISDICTION

The Fifth Circuit Court of Appeals entered its Judgment on March 21, 1995 (Appendix B-1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, §2, cl. 1. (Appendix D-1)

28 U.S.C. §1333. Admiralty, maritime and prize cases. (Appendix D-2)

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STATEMENT OF THE CASE

This case concerns the Limitation of Vessel Owner's Liability Act ("Limitation Act"), 46 U.S.C. §181, et seq. Sections 183 and 185 of the Limitation Act and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule F")[1] provide the substantive and procedural remedies for a vessel owner to seek Exoneration from and/or Limitation of Liability in a federal admiralty court. This case also concerns a direct conflict between the exclusive grant of original jurisdiction to a federal district court, sitting in admiralty in a Limitation proceeding, and the common law right afforded a litigant to bring a maritime claim in a state court under the "Saving to Suitors" Clause. See 28 U.S.C. §1333(1). The need for uniformity in the administration and application of maritime law is again before this Court.[2]

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[1]Rule F is part of the Supplemental Rules for Certain Admiralty and Maritime Claims, which Rules are part of the Federal Rules of Civil Procedure. These Supplemental Rules preserve certain distinctive maritime remedies and are applicable to all admiralty and maritime claims within the meaning of F.R.C.P. 9(h).

[2]The collision between state law and maritime law is presently before this Court in Yamaha Motor Corp. U.S. v. Calhoun, No. 94-1387, where this Court granted certiorari on May 23, 1995.

Uniformity is jeopardized because state courts have often refused to apply maritime law in certain significant instances.[3]

The Limitation Act is essentially the same as originally enacted in 1851. Its purpose is to protect a vessel under specified circumstances from being exposed to liabilities greater than the Limitation fund which is the value of its vessel. The Limitation Act and Rule F guarantee a shipowner the right to bring a proceeding in federal court seeking Exoneration from, or alternatively Limitation of, Liability for a maritime accident.[4] Generally, "Exoneration from Liability" occurs where a vessel owner is ultimately found to be free from any fault or negligence; whereas, "Limitation of Liability" is permitted only if the negligence was committed "without the privity or knowledge" of the vessel's owner and operator. 46 U.S.C. §183(a).

The Limitation proceeding is intended to protect a shipowner from defending and litigating numerous claims in multiple courts. This is achieved by a federal court, sitting in admiralty, issuing a monition, or injunction, staying all other proceedings

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[3]For example, state law has been applied to maritime cases in the following instances: Green v. Industrial Helicopters, Inc., 593 So.2d 641 (La.), cert. denied, 113 S.Ct. 65 (1992) (maritime tort); Miller v. American Dredging Co., 595 So.2d 615 (La. 1992)(forum non conveniens); Folse v. Western Atlas Int'l., Inc., 593 So.2d 341 (La. 1992)(seaman status under the Jones Act); Parker v. Rowan Companies, Inc., 599 So.2d 296 (La.), cert. denied, 113 S.Ct. 203 (1992)(jury trial designation in maritime action); Mayo v. Nissan Motor Corp., 639 So.2d 773 (La.Ct.App. 3d Cir. 1994), writ denied, 651 So.2d 280 (1995)(products liability law).

[4]Rule F and the Limitation Act address venue, the parties entitled to limit liability, time limitations, the establishment of a limitation fund and the amount of the fund, and the restraint of other legal proceedings against a shipowner pending resolution of the limitation action.

against the vessel owner and requiring any party having a claim against the vessel owner to assert it in the Limitation proceeding. The federal judge in a non-jury admiralty case is empowered to adjudicate all claims asserted against the vessel owner and to decide whether the vessel owner is entitled to Exoneration from or Limitation of Liability.

When there are multiple claims that exceed the Limitation fund, the federal court brings the various claims into "concourse" and does so by invoking an admiralty "concursus proceeding." See 46 U.S.C. §185 and Rule F. In a concursus proceeding, all claims against the shipowner are considered and adjudicated in a single trial. The concursus is essential to a Limitation action involving multiple claims which exceed the Limitation fund; without it, a vessel owner may be required to litigate numerous claims in various different courts, a procedure which is directly contrary to the intent of Congress under the Limitation Act and Rule F.

This case arises out of an explosion that occurred in August of 1993 aboard an oilfield service barge on navigable waters within the State of Louisiana undergoing repairs.[5] Two employees of Texaco Exploration and Production Inc., Ellender and Williams, were injured.[6] Texaco Inc. and Texaco Exploration Production Inc. timely filed a Petition for Exoneration from and Alternatively,

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[5]Texaco Inc. was the owner of the barge and Texaco Exploration and Production Inc. was the bareboat charterer or owner pro hac vice of the barge.

[6]Ellender was the master of the barge and was in all respect in command of the vessel and the welding work that was taking place at the time of the accident. Williams was a shore-based welder who was operating a welding torch at the time of the accident. Petitioners contend that Respondents caused the accident by failing to follow standard operating procedures.

Limitation of Liability with the United States District Court for the Eastern District of Louisiana. In accordance with the Limitation Act and Rule F, a bond representing the value of the vessel was posted. The federal admiralty court then enjoined all other court actions arising out of this incident. All claimants were ordered to file their claims in the admiralty Limitation proceeding. Ellender had already filed a Jones Act suit in a Louisiana state court, which was stayed by the federal court injunction. Both Williams and Ellender have timely asserted claims in the Exoneration/Limitation proceeding. Their asserted claims exceed the Limitation fund. Discovery proceeded and a trial on the merits was scheduled in the federal court Limitation action.

Shortly before the commencement of the trial, claimants filed a motion to lift the stay order entered by the admiralty court, contending that they were entitled to proceed with separate state court actions before the Limitation action was decided. All parties agreed that the Limitation action involved "multiple claims" and an "inadequate fund." The federal district court denied claimants' request to lift the stay order based upon the express language of the Limitation Act and the prior decisions of this Court in Langnes v. Green, 282 U.S. 531, 51 S.Ct. 243 (1931), and Lake Tankers Corp. v. Henn, 354 U.S. 147, 77 S.Ct. 1264 (1957). See Matter of Texaco Inc., 847 F.Supp. 457 (E.D.La. 1994) (Appendix A-1).

Specifically, the federal district court found that the concursus proceeding of the Limitation Act is "vital to protect the petitioners' right to Exoneration and/or Limitation within the meaning of the Limitation Act and Rule F which prescribes the form and mode of proceeding in a case such as this one." 847 F.Supp. at 459, Appendix at A-3. The district court recognized that the concursus proceeding was created by Congress to permit the federal district

court, sitting in admiralty without a jury, to determine Exoneration from or Limitation of Liability. The court emphasized that the concursus procedure is the "only way that the admiralty court could achieve the primary purpose of the Act, 'to provide a marshalling of assets [and] the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full.'" 847 F.Supp. at 459-60, Appendix at A-4 (emphasis in original and citations omitted).

In denying the motion to lift the stay, the district court noted that the claims did not fall within the only two circumstances where this Court has held that a concursus was not necessary: (1) where there is a single claim; Langnes, supra, or, (2) where there are multiple claims, but where the fund is deemed "adequate," meaning that the claims do not exceed the value of the Limitation fund; Lake Tankers Corp., supra. Even under these two circumstances, however, the claimant must enter into certain stipulations with the admiralty court before proceeding with any claim outside the Limitation action. These stipulations protect the right of the vessel owner to ultimately seek exoneration from liability.[7]

The Fifth Circuit reversed the district court and remanded the case to district court. The question presented entails "a recurring and inherent conflict" between "the exclusive jurisdiction vested in the admiralty courts by the Limitation of Liability Act and the common law remedies embodied in the Saving to Suitors Clause of 28 U.S.C. §1333." Texaco Inc. v. Williams, 47 F.3d 765 (5th Cir. 1995), Appendix at B-1.

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[7]After a special circumstance is demonstrated, the federal admiralty court still requires that claimants file acceptable stipulations recognizing, inter alia, its exclusive jurisdiction to hear the limitation case and waiving any preclusive effect of any judgment rendered in another forum.

The appellate court noted this Court's precedents in Green, supra, and Lake Tankers, supra, which recognized the only two circumstances where a concursus was not vital to a shipowner's concursus rights as legislated in the Limitation Act: single claim or adequate fund. However, with express reservation, the three-judge panel declined to follow this Court's precedents and its own precedents; instead it engaged in "judicial legislation" and created a third and new circumstance, allowing multiple claimants whose claims exceed the Limitation fund to pursue remedies in other federal or state courts. In doing so, the appellate panel noted that: "[W]e may have reservations concerning the breadth of this exception and the correctness of condoning a multiplicity of lawsuits, some of which will be duplicitous . . ." Williams, 47 F.3d at 768-69, Appendix B-6, B-7 (emphasis added and footnote omitted).

It is submitted that this Court should exercise its discretion under Rule 10 of the Rules of the Supreme Court of the United States ("Rule 10") and grant certiorari because this case raises "special and important reasons therefor" within the meaning of Rule 10. As shown more fully below, the opinion of the Fifth Circuit panel:

a. Eviscerates the Limitation Act and Rule F because it does not allow a vessel owner its statutorily guaranteed concursus proceeding and subjects it to multiple lawsuits in multiple forums, thereby allowing the very situation which Congress has expressly prohibited;

b. Is in direct conflict with the decisions of this Court and the Fifth Circuit concerning the Limitation Act;

c. Abdicates the exclusive grant of admiralty jurisdiction allowed by Article III §2 Clause 1 of the Constitution in

favor of common law state remedies under circumstances which expressly mandate by federal statute the exercise of federal jurisdiction by an admiralty court.

REASONS FOR GRANTING THE WRIT

1. THE APPELLATE COURT IMPROPERLY ENGAGED IN "JUDICIAL LEGISLATION" PROHIBITED BY THIS COURT SINCE CONGRESS HAS SPECIFICALLY STATED THAT A VESSEL OWNER IS ENTITLED TO A CONCURSUS PROCEEDING IN A LIMITATION ACTION WHERE THERE ARE MULTIPLE CLAIMS ASSERTED WHICH EXCEED THE AMOUNT OF THE LIMITATION FUND.

Federal courts cannot "legislate" where Congress has enacted a clear and specific statute.[8] Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317 (1990); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S.Ct. 2485 (1986); and, Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 98 S.Ct. 2010 (1978). As this Court succinctly stated in Higginbotham: "[w]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute." 436 U.S. at 626, 98 S.Ct. at 2015. Again in 1990, in another maritime case, this Court emphasized that "Congress, in the exercise of its legislative powers is free to say, 'this much and no more.' An admiralty court is not free to go

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[8]Likewise, this Court has repeatedly recognized that it is the function of Congress, and not the federal courts, to amend or repeal a federal statute. Tennessee Valley Authority v. Hill, 437 U.S. 153, 194-95, 98 S.Ct. 2279, 2302 (1978); Mobil Oil Corp., 436 U.S. at 625, 98 S.Ct. at 2015; Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 438 U.S. 519, 558, 98 S.Ct. 1197, 1219 (1978).

beyond those limits." Miles, 498 U.S. at 24, 111 S.Ct. at 321.

The Fifth Circuit panel has in effect judicially legislated by allowing claimants in a multiple claim, inadequate fund Limitation proceeding to initially proceed in a forum of their choice which is contrary to the statutory will of Congress.

In the Limitation Act, as supplemented by Rule F, Congress enacted a mandatory procedure to prevent a vessel owner from defending multiple claims in numerous state or federal forums. This Court has recognized that a Limitation action is a statutory right created by Congress and is not a remedy which was "Saved to Suitors" at common law. Butler v. Boston and Savannah Steamship Co., 130 U.S. 527, 9 S.Ct. 612 (1889); see also J. Donovan, The Origins and Development of Limitation of Shipowner's Liability, 53 Tul.L.Rev. 999, 1027-28 (1979). The constitutionality of the Limitation Act has been affirmed by this Court[9] and, as one commentator wrote, the decisions of this Court provide "[t]he Limitation Act with an all but impregnable foundation while also making its effect coextensive with the admiralty and maritime jurisdiction of the United States." J. Donovan, The Origins and Development of Limitation of Shipowners' Liability, 53 Tul.L.Rev. at 1027.

The concursus proceeding, as defined by this Court in Lake Tankers, supra, is "the heart of the limitation system" created by Congress. It is the very essence of a Limitation action:

> The beneficent object of the law, in enabling the shipowner to bring all parties into concourse who

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[9] Lord v. Steamship Co., 102 U.S. 541, 26 L.Ed. 224 (1880); Providence/ N.Y.S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 3 S.Ct. 379 (1883).

> have claims arising out of a disaster or loss, and thus to prevent a multiplicity of actions, and to adjust the liability to the value of the ship and freight, has been commented on in several cases that have come before this Court. Notably, in the cases of Norwich Co. v. Wright, 80 U.S. (13 Wall.) 104, and Providence/N.Y.S.S. Co. v. Hill Mfg. Co., 109 U.S. 578.

Butler, 130 U.S. at 552, 9 S.Ct. at 617.[10]

This Court and the lower courts have recognized only two limited circumstances where the lack of a concursus does not violate the statutory requirements. These circumstances have been termed "exceptions" but an examination of them reveals that they are not really exceptions, but only situations where it is not necessary to have a concursus based on the special circumstances presented. The first is where there is a "single claim" asserted against the vessel owner in a Limitation proceeding. Ex Parte Green, 286 U.S. 437, 52 S.Ct. 602 (1932). The second is where there are multiple claims and an "adequate limitation fund." Lake Tankers Corp. v. Henn, 354 U.S. 147, 151-8, 77 S.Ct. 1269, 1272 (1957).[11]

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[10]This Court has also noted that "[t]he very nature of the [limitation] proceeding is such that it must be exclusive of any separate suit against an owner on account of the ship." Metropolitan Redwood Lumber Co. v. Doe, 223 U.S. 365, 32 S.Ct. 275 (1912).

[11] "The concursus provided by the Act is of no use, where there is but a single claim and unwarranted where there is a fund adequate to meet all claims. The desire of claimants to have a jury trial, or to proceed in other courts of their own choice leads therefore to exceptional procedures when it is clear that there is involved only one claim or a completely adequate fund." G.Staring, Limitation Practice and Procedure, 53 Tul.L.Rev. at 1158.

A concursus proceeding is absolutely mandated here where there are multiple claims and the Limitation fund is inadequate to satisfy all claims. The Fifth Circuit panel in this case has refused to follow the express language of a statute and imposed a rule that would render meaningless the concursus proceeding of 46 U.S.C. §183 and Rule F. The decision below requires a vessel owner to defend multiple claims before a jury in multiple courts with a risk of a lack of uniformity in the law to be applied to the case.

Further, the Fifth Circuit's panel decision is also in direct conflict with its prior decision in Pershing Auto Rentals, Inc. v. Gaffney, 279 F.2d 546 (5th Cir. 1960), where the Fifth Circuit affirmed the mandate of Congress and held that a federal admiralty court could not modify its traditional injunction to permit the claimants to establish their claims initially in a state common law court. Judge John Brown wrote for the Pershing majority and held:

> If an admiralty court in a multiple-claims-inadequate-fund case may permit the claimants first to try the issue of liability vel non and damages in every claim in court actions outside of the limitation proceeding during which time the limitation case will be in a suspensive state of limbo, there will be little, if anything, left of the statutory scheme created by Congress and implemented by Admiralty Rules contemplated in the statute. Because this is about all that is left now.

279 F.2d at 549-50.

It is respectfully submitted that special and important reasons exist in this Petition for granting certiorari and that this Honorable Court should exercise its discretionary power of review since a

Fifth Circuit panel has substituted its views for the clear mandate of the statute enacted by Congress and expressly recognized by this Court.

2. A FEDERAL COURT CANNOT ABDICATE ITS EXERCISE OF ADMIRALTY JURISDICTION IN A PROCEEDING UNDER THE LIMITATION ACT IN FAVOR OF COMMON LAW STATE REMEDIES.

The Saving to Suitors Clause of 28 U.S.C. §1333(1) does not supersede the power of a federal district court, sitting in admiralty, to exercise its exclusive jurisdiction in a case filed under the Limitation Act and Rule F. Langnes v. Green, 282 U.S. at 540, 51 S.Ct. at 246.[12] Abstention from the exercise of federal jurisdiction is "the exception, not the rule." Colorado River Water Conser. Dist. v. U. S., 424 U.S. 800, 813, 96 S.Ct. 1236, 1244 (1976). A federal district court has little discretionary power not to hear a case within its jurisdiction. Id.

While the Saving to Suitors Clause permits a maritime claim to be made in a state court, a proceeding under the Limitation Act and Rule F can only be brought in a federal admiralty court since the federal admiralty court has exclusive jurisdiction in such matters.[13] A Limitation action cannot be filed in state court, nor

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[12]This Court has recognized that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." Romero v. International Terminal Operating Co., 358 U.S. 354, 373, 79 S.Ct. 468, 480 (1959).

[13]A federal court "having jurisdiction of the case, under and by virtue of the Act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the party..." Norwich & N.Y. Transportation Co. v. Wright, 80 U.S. (13 Wall.) 104, 20 L.Ed. 243 (1872).

can the defense of Exoneration/Limitation be considered by a state court.[14] The Saving to Suitors Clause does not authorize a federal court to abdicate to a state court its exclusive admiralty jurisdiction over a Limitation proceeding. In Grubart, Inc. v. Great Lakes Dredge & Dry Dock Co., 115 S.Ct. 1043 (1995), this Court recently considered the subject of maritime jurisdiction over torts in the context of the Limitation Act. Mr. Justice Souter stated:

> A federal court's authority to hear cases in admiralty flows initially from the Constitution, which 'extend[s]' federal judicial power 'to all Cases of admiralty and maritime Jurisdiction.' U.S. Const., Art. III, §2. Congress has embodied that power in a statute giving federal district courts 'original jurisdiction...of...[a]ny civil case of admiralty or maritime jurisdiction...' 28 U.S.C. §1333(1).

115 S.Ct. at 1047.

Grubart enforces the need for uniform rules of maritime conduct and liability pronounced by this Court in Sisson v. Ruby, 497 U.S. 358, 110 S.Ct. 2892 (1990). Professor Schoenbaum in his treatise, Admiralty and Maritime Law, Hornbook Series, 2d

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[14]Langnes v. Green, 282 U.S. 531, 539, 51 S.Ct. 243, 246 (1930); Vatican Shrimp Co. v. Solis, 820 F.2d 674 (5th Cir.), cert. denied, 108 S.Ct. 345 (1987). This Court again affirmed that "as the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures." Butler v. Boston, 130 U.S. at 557, 9 S.Ct. at 619.

(West 1994), aptly notes that Sisson is a "salutary development" and challenges the lower federal courts "to get back to basics." Id. at 30.

The present action of the Fifth Circuit is contrary to the basic jurisdictional mandate conferred by Congress upon a federal court sitting in admiralty. Their decision forces a vessel owner to initially litigate multiple claims in state courts before juries and deprives a vessel owner of its right to be heard first in federal court before an admiralty judge. Federal admiralty law, which includes a Limitation of Liability concursus proceeding, cannot be abdicated and thus thwarted:

> Needless to say that, if the case for a limitation of liability assumes such a form that only a federal court is competent to afford relief, the jurisdiction of that court is exclusive, and must be exerted to dispose of the entire cause; and the action in the state court may not be further prosecuted.

Langnes v. Green, 282 U.S. at 540, 51 S.Ct. at 246.

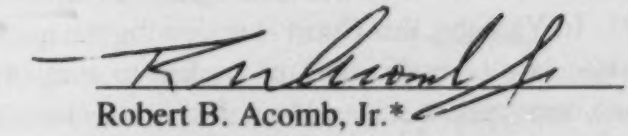
In Lake Tankers, this Court specifically recognized that the concursus proceeding was vital to protect the shipowner's rights. Lake Tankers, 354 U.S. at 154, 77 S.Ct. at 1273. The decision below permits state court litigation in favor of proceedings in a federal court and improperly usurps the exclusive jurisdiction of the federal admiralty court. This result is fatal to the orderly administration of a Limitation proceeding. Judicial economy and the avoidance of piecemeal litigation are also disrupted because the panel's decision has forced a vessel owner to defend multiple suits in multiple forums. Uniformity, the express goal of admiralty law, has been disrupted.

Uniformity and the conflict between state law and maritime law is presently before this Court in Yamaha Motor Corp. U.S. v. Calhoun, No. 94-1387, where this Court granted certiorari on May 23, 1995. In Yamaha, this Court is reviewing the question of whether state law or maritime law applies to a claim for wrongful death occurring in state waters. Petitioners have filed a motion to consolidate this Petition of Certiorari with the Yamaha decision. This Petition should also be granted because a federal court cannot abdicate its exercise of admiralty jurisdiction in a proceeding under the Limitation Act in favor of common law state remedies.

CONCLUSION

It is respectfully submitted that the questions presented by this Petition merit review by this Court in accordance with Rule 10. This Court should consider whether the decision below is tantamount to "judicial legislation" usurping the express mandate of Congress and whether the decision below is in direct conflict with the Limitation Act, Rule F, and the decisions of this Court. This Court should also intervene and resolve the conflict between the Limitation Act and the exclusive power of an admiralty court to consider a Limitation action, on the one hand, and the attempt of a litigant to assert a maritime claim in state court under the Saving to Suitors Clause.

Respectfully submitted,



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In re the Matter of TEXACO, INC., as Owner, and Texaco Exploration and Production, Inc. , as Owner PRO HAC VICE and Operator of the BARGE BUSTER LEE Tx 4-878, Praying for Exoneration from and/or Limitation of Liability.

Civ. A. No. 93-3427.
United States District Court,
E.D. Louisiana.
March 2, 1994.

CHARLES SCHWARTZ, Jr., District Judge.

Before the Court is claimants', Harrison Ellender and Paul Williams', Motion to Lift Stay and/or Lift Restraining Order in the captioned matter filed on behalf of petitioners', TEPI and Texaco, Inc., ***for exoneration from* and/or limitation of liability.** In support of their motion, claimants' cite the recent Fifth Circuit case, *0DECO Oil & Gas Co. v. Bonnette,* 4 F.3d 401 (5th Cir. 1993), which allowed claimants in a multiple claimant-*in* sufficient fund limitation proceeding to enter stipulations which would protect the shipowner's right to limitation of liability and at the same time allow the claimants to proceed with their *damage* claims in a single state court. TEPI and Texaco, Inc. (hereafter "the petitioners") filed formal opposition arguing *inter alia*, that (1) the stipulations entered by the claimants fail to adequately protect their interests in this *serious suit seeking exoneration* from any and all *liability* and limitation in the alternative; and (2) that the recent *ODECO* case is inapposite.[1]

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[1] The Fifth Circuit in *ODECO Oil & Gas Co. v. Bonnette*, 4 F.3d 401 (5th Cir. 1993) acceded to the claimants' choice of forum, finding no intrinsic harm in staying a "*limitation*" proceeding pending a determination of damages in the Texas state court *if* it is accompanied by stipulations fully preserving petitioner's right to litigate *all* issues pertaining to *limitation* in the *limitation court* free of any claims of *res judicata* and to abide by the an admiralty court determination of the right to limit.

The matter was set for oral hearing on Wednesday, March 2, 1994, but was submitted on the briefs. The Court, having considered the written submissions of the parties including their rebuttal and supplemental briefs, the applicable law, and for the reasons hereinafter stated, DENIES claimants' Motion to Lift Stay and/or Lift Restraining Order.

In *ODECO*, supra, the petitioner ODECO contended its case was a "multiple claimant-inadequate fund case." There was no mention of the possibility of exoneration from liability, whatsoever, in the entirety of the *ODECO* decision.[2] Proceeding from the premise that it was solely's ODECO's *right to limit* that was at issue, the Fifth Circuit held that it must accede to the multiple claimants' right to proceed in the forum of their choice "*if* it is accompanied by stipulations fully protecting ODECO's right to limit liability and agreeing to abide by an admiralty court determination of the right to limit." 4 F.3d at 405.

Unlike *ODECO*, the instant case is by and large a serious "*exoneration* from liability" suit, seeking limitation of liability only in the alternative.[3] Under the circumstances, this Court is *not*

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[2] Fearing the possibility of multiple negligence claims under Section 905(b) of the LHWCA, ODECO filed a declaratory judgment action seeking a determination, *inter alia*, whether an action for damages was barred by the statue and alternatively, seeking "to limit its liability to $30,000, the alleged value of the capsule, pursuant to the Limitation of Liability Act..." *ODECO Oil & Gas Co., Drilling Div. v. Bonnette,* 4 F.3d 401, 403 (5th Cir. 1993).

[3] The instant proceeding arises out of an incident in August 1993, involving an explosion which occurred on the tank barge, BUSTER LEE, resulting in property damage and personal injuries. Petitioners submit that the evidence at the trial on liability will show that they were free from fault entitled to exoneration from liability, and not merely limitation of liability.

"hard-pressed" to deny claimants their choice of forum. Indeed, the concursus is vital to protect the petitioners' right to exoneration and/or limitation within the meaning of the Limitation Act and Supplemental Admiralty Rule F which prescribes the form and mode of proceeding in a case such as this one. Claimants' stipulations fail to protect petitioners in the case at bar who seek exoneration, and alternatively, limitation from liability. Since ODECO, supra, does not begin to address the issues inherent in this case, the Court is of the opinion that it is not bound by its pronouncements.

Moreover, this Court will not create a "third" exception to rule. It is well settled that federal admiralty courts have exclusive jurisdiction over the shipowner's right to limit their liability under 46 U.S.C. § 181 *et seq.* (hereinafter referred to as "the Act"), and only the federal courts have jurisdiction to consider or adjudicate the issues arising out of a § 185 proceeding. Supplemental Admiralty Rule F(2) provides that a complaint under the Act may demand exoneration from as well as limitation of liability. Thus, in a suit seeking exoneration from and alternatively, limitation of liability under the Act, the limitation court must initially address exoneration from liability, inasmuch as in the event no liability is found, there is nothing to limit. Supplemental Rule F(8) provides in pertinent part: "*Upon determination of liability* the fund deposited or secured, or the proceeds of the vessel and the pending freight, shall be divided pro rata..." (emphasis supplied).

The Second Circuit in *In re Complaint of Dammers & Vanderheide & Sheepvaart Maats Christina B.V.*, 836 F.2d 750, 754 (2nd Cir. 1988) succinctly set forth the purposes of the Act, to wit:

[I]n a proceeding known as a *concursus*, the district court, sitting in admiralty without a jury, determines 'whether there was negligence; if there was negligence, whether it was without the privity and knowledge of the owner; and if limitation is

granted, how the [limitation] fund should be distributed.' [*Matter of Complaint of] Universal Towing,* 595 F.2d [414] at 417 [8th Cir. 1979)]. *It is the only way that the admiralty court can achieve the primary purpose of the Act*–'to provide a marshalling of assets [and] the distribution pro rata of an inadequate fund among claimants, non of whom can be paid in full.' *In re Moran Transportation Corp.*, 185 F.2d 386, 389 (2d Cir. 1950), *cert. denied,* 340 U.S. 953, 71 S.Ct. 573, 95 L.Ed. 687 (1951). *See also Lake Tankers*, 354 U.S. at 151-52, 77 S.Ct. at 1272; *Newton v. Shipman*, 718 F.2d 959, 961 (9th Cir. 1983) (per curium); *S & E Shipping [v. Chesapeake & Ohio R.R.Co.]* 678 F.2d [636] at 642 [(6th Cir. 1982)]; *Universal Towing,* 595 F.2d at 417.

In exercising this equitable power, of course, the admiralty court must necessarily deny the claimants their right to pursue common law claims before a jury. *There is no right to a jury in actions instituted in admiralty, see Waring v. Clarke,* 46 U.S. (5 How.) 441, 458-60, 466, 12 L.Ed. 226 (1847); *Newton v. Shipman*, 718 F.2d at 962, and the claimants are enjoined from pursuing common law actions in other forums. *Id.* (emphasis added).

Recognizing the conflict between exclusivity of jurisdiction under the Act and the promise of 28 U.S.C. § 1333 that the exercise of admiralty jurisdiction will not deny suitors their right to common law remedies, courts have identified two sets of circumstances in which the exclusive jurisdiction of the admiralty courts must give way, to wit: (1) the single claimant exception–where a *single* claimant brings an action seeking an amount in excess of the limitation fund, the district court must limit the stay of other proceedings if that claimant concedes the admiralty court's exclusive jurisdiction to determine all issues relating to exoneration from and/or limitation of liability; and (2) the multiple claimant-sufficient fund exception–where the limitation fund, which represents the value of the vessel and its cargo, exceeds the aggregate of the claims to be made against it, a

concursus is unnecessary and a district court must allow claimants to proceed in other forums.[4]

Claimants in the case at bar fail to come within the purview of either of the aforesaid well-defined exceptions. In this multiple claimant situation the aggregate of the claims far exceeds the limitation fund.

The Court is also guided by the Supreme Court's admonitions in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed. 2d 275 (1990) in its refusal to create a third exception to exclusivity of jurisdiction under the Act, to wit: "In this era, an admiralty court should look *primarily to* [] legislative enactments for policy guidance;" "keep strictly within the limits imposed by Congress;" and "be vigilant not to overstep the well-considered boundaries imposed by federal legislation" as "these statutes both direct and delimit our actions." *Id.* at 27, 111 S.Ct. at 323. Although the Supreme Court in *Miles* was specifically concerned with remedies available the Jones Act and DOHSA, it also spoke to legislation in general, to wit:

> Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles...
>
> But legislation sends other signals to which an admiralty court must attend. 'The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect.' Congress, in the exercise of its legislative powers, is free to say 'this much and no more.' An admiralty court is not free to go beyond those limits.

id. at 24, 111 S.Ct. at 321.

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[4] *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 151-52, 77 S.Ct. 1269, 1272, 1 L.Ed.2d 1246 (1957); *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546, 549-50 (5th Cir. 1960); *In re Dammers & Vanderheide & Sheepvaart Maats Christina B.V.*, 836 F.2d 750, 754-55 (2nd Cir. 1988).

The Limitation of Liability Act which became effective in 1851 was established "to encourage the development of American merchant shipping."[5] The Act addresses "misfortunes at sea where the losses incurred exceed the value of the vessel and pending freight."[6] Under these circumstances a shipowner may invoke protection of the Act by filing a complaint for exoneration from and/or limitation of liability. 46 U.S.C. § 185 (1988); Supplemental Admiralty Rule F. Upon compliance with the statute's requirements, the Act provides that "all claims and proceedings against the owner with respect to the matter in question shall cease." *Id.*

As counsel for petitioners aptly points out, that while the Act has been effect for well over a century, it can hardly be characterized as antiquated. It was amended by Congress in 1936 and again in 1984 without changing the longstanding procedural rules enunciated by the Supreme Court and by lower federal courts.

In this vein, Supplemental Admiralty Rule F(3) further defines the procedural requirements to invoke the Act's protections and provides that "on application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or plaintiff's property with respect to any claim subject to the limitation action."

In *Lake Tankers Corp. v. Henn,* the Supreme Court emphasized the importance of the concursus, stating that "concursus is 'the heart' of the limitation proceeding" and vital to the protection of rights of the vessel owner created by Act of Congress. 354 U.S. at 151-54, 77 S.Ct. at 1272-73. The foregoing reminds this Court of its prior holding in *In re Exoneration from or Limitation*

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[5] *Lake Tankers Corp. v. Henn,* 354 U.S. 147, 150, 77 S.Ct. 1269, 1271, 1 L.Ed.2d 1246 (1957).

[6] *Id.* at 151, 77 S.Ct. at 1272.

of Liability of Shell Oil Co., 780 F.Supp. 1086 (E.D.La. 1991) wherein it refused claimants' request to modify an injunction, stating that:

The limitation proceeding's purposes other than encouraging investment in the shipping industry figure significantly in this Court's determination of the issues before it. Augustus Hand wrote early on in the jurisprudence: "The purpose of a limitation proceeding is not merely to limit liability but to bring *all claims* into concourse and settle *every* dispute in *one* action." *The Quarrington Court*, 102 F.2d 916, 918 (2nd Cir.), *cert. denied*, 307 U.S. 645, 59 S.Ct. 1043, 83 L.Ed. 1525 (1939) (emphasis added).

A critical purpose underlying the limitation action is to achieve a "*complete* and just disposition of a many-cornered controversy." Thus, the limitation proceeding furthers the goal of uniformity which has been declared a dominant requirement for admiralty law. The importance of this aspect was reiterated by Justice Frankfurter in *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, [414-17] 74 S.Ct. 608, 611-12, 98 L.Ed. 806 (1954), wherein it is stated:

The heart of [the limitation] system is a concursus of all claims to ensure prompt and economical disposition of controversies in which there are often a multitude of claimants...

Moving claimants' motion to modify the injunction is antithetical to the very nature of the limitation proceeding... The Limitation of Liability Act provides this Court with the power to enjoin suits against the "owner" to achieve *uniformity* and accordingly, assure that all claims will be heard in a single forum. *Id. at* 1091.

In their rebuttal memorandum, claimants direct this Court's attention to the language in the Supreme Court's decision in *Lake Tankers that* the Limitation "Act is not one of immunity from

liability but limitation of it" and further argue that exoneration from liability is not contemplated by the Act. 354 U.S. at 152-53, 77 S.Ct. at 1272.

Claimants' argument ignores wholly ignores the initial determination that must be made by the limitation court–that is, whether the vessel owner is liable. That one court may conclude the owner was not negligent, another may find the owner was negligent, a third may conclude a claimant is entitled to $100,000, and another may determine damages at $1,000,000 explains why the *concursus is vital* in a multiple claimant/insufficient fund scenario. Unquestionably, in proceedings where this does happen, the limitation court's efforts are thwarted and may not effectively secure the vessel owner's rights under the Limitation Act. See, *Providence & New York S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 594-95, 3 S.Ct. 379, 389-90, 27 L.Ed. 1038 (1883) (stating, *inter alia,* "the very object of the proceedings for limited liability is to inquire and determine whether the parties ought to be sued at all in any other tribunal after giving it up, or submitting to pay the value of, all their interest in the ship and freight."). In the *Providence* case, the Supreme Court observed:

[T]he practical value of the [limitation of liability] law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship-owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford commercial operations (as before stated) will be of the last importance; but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions.

109 U.S. at 588-89, 3 S.Ct. at 386.

Under Supplemental Admiralty Rule F promulgated by the Supreme Court, the questions to be settled in proceedings under the Limitation Act are first, whether the ship or its owners are liable, and secondly, if liable, whether the owners are entitled to limitation of liability. To render a conclusive decision, the limitation court must have control of the subject of the aforesaid inquiries *to the exclusion of other courts.* This Court is quite familiar with the Supreme Court's statement in *Lake Tankers* to the effect that the Limitation Act was not adopted to insulate shipowners from liability. However, this statement should not be read out of context. The *Lake Tankers* court further explained that its decision was *not* at all contrary to thrust of the Supreme Court's earlier decision in *Cushing*, wherein it held that *concursus* is "'the heart'" of the limitation system because it refers to those cases where the claims exceed the value of the vessel and pending freight. The instant case is also one of those cases–that is, a case involving multiple claims which exceed the value of the vessel and pending freight. The *Lake Tankers* court stated in no uncertain terms that: "In that event, as we have pointed out, **the *concursus* is vital to the protection of the offending owner's statutory right of limitation.**" 354 U.S. at 154, 77 S.Ct. at 1273. This Court is bound by the latest statement of the Supreme Court–that is, in a multiple claims insufficient fund case the concursus is vital to the protection of petitioner's rights under the Act. The case at bar indubitably falls into that category.

Accordingly, and for all of the above and foregoing reasons,

IT IS ORDERED that claimants' Motion to Lift Stay and/or Lift Restraining Order is hereby DENIED.

TEXACO, INC., as owner, praying for exoneration from and/or limitation of liability, et al., etc.,
Petitioners-Appellees,

v.

Paul WILLIAMS and Harrison Ellender,
Claimants-Appellants.

No. 94-30191.
United States Court of Appeals, Fifth Circuit.
March 21, 1995.

Before REYNALDO G. GARZA, DeMOSS and BENAVIDES, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

Background

On August 24, 1993, a fire and an explosion occurred on the T/B BUSTER LEE, a barge owned by Texaco, Inc. (Texaco) and bare boat chartered by Texaco Exploration and Production, Inc. (TEPI). Appellants Ellender and Williams, employees of TEPI, were severely burned in the accident. Appellant Ellender filed a Jones Act claim in Louisiana state court. On October 18, 1993, Texaco and TEPI filed a complaint in federal court seeking exoneration from or limitation of liability. The district court issued an order staying Ellender's state court action and restraining Williams from filing a similar state claim. Appellants filed answers in the limitation proceeding, seeking damages in excess of $8 million. These claims exceeded the value of the vessel, valued by Texaco at $125,000. Claimants then filed a motion to lift the stay, seeking to pursue their rights under the savings to

suitors clause.[1] The district court denied their motion and this appeal ensued.

Discussion

The issue before this Court involves "a recurring and inherent conflict" between the exclusive jurisdiction vested in admiralty courts by the Limitation of Liability Act[2] and the common law remedies embodied in the saving to suitors clause of 28 U.S.C. § 1333.[3] The Limitation Act provides that the liability of a shipowner shall not exceed the value of the vessel at fault and her pending freight if the casualty occurred without the privity or knowledge of the shipowner. Federal courts have exclusive jurisdiction over suits invoking the Act, "saving to suitors...all other remedies to which they are otherwise entitled."[4]

When a shipowner invokes the Act the federal court may stay all other proceedings against the shipowner arising out of the same accident and require all claimants to timely assert their claims in the limitation court. The purpose of the limitation is to preserve the right of the shipowner to limit its liability in a federal forum to the value of the vessel and her pending freight.[5] The

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[1] 28 U.S.C. § 1333.

[2] 46 U.S.C. App. § 183.

[3] *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 754 (2d Cir. 1988).

[4] 28 U.S.C. § 1333.

[5] *Magnolia Marine Transp. v. LaPlace Towing Corp.* 964 F.2d 1571, 1575 (5th Cir. 1992) (citing *Langnes v. Green*, 282 U.S. 531, 543, 51 S.Ct. 243, 247, 75 L.Ed. 520 (1931)).

problem is that "one statute [gives the complainant] the right to a common-law remedy, which he [may seek] in the state court; and another statute [gives the shipowner] the right to seek a limitation of liability in the federal district court."[6] The courts have attempted to resolve this conflict by creating exceptions to the exclusive jurisdiction of the federal courts. Initially, two exceptions were recognized: (1) the single-claim-inadequate-fund situation, and (2) the multiple-claim-adequate-fund situation. In *Ex parte Green*,[7] the Supreme Court held that a single claimant seeking damages in excess of the limitation fund may proceed outside of the limitation action if the claimant agreed not to raise issues to be decided in the limitation court. In *Lake Tankers Corp. v. Henn*,[8] the Supreme Court faced the issue of multiple claims that exceeded the limitation fund. The Court held that the claimants could proceed outside of the limitation proceedings if they relinquished their rights to damages in excess of the amount of the limitation fund.[9] The Court reasoned that in this situation, the "state proceeding could have no possible effect on the petitioner's claim for limited liability"; both the shipowner's right to limit liability in a federal forum and the claimants' rights to pursue their state law remedies under the savings to suitors clause were protected. Under this backdrop, the Fifth Circuit has held that, with proper stipulations, claimants may proceed out-

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[6] *Langnes*, 282 U.S. at 539-40, 51 S.Ct. at 246.

[7] 286 U.S. 437, 52 S.Ct. 602, 76 L.Ed. 1212 (1932).

[8] 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed.2d 1246 (1957).

[9] The respondent filed stipulations agreeing to neither increase the claims, nor to enter into a judgment in excess of these amounts, and waived any claims of res judicata.

side the limitation action.

In *Magnolia Marine Transport v. Laplace Towing Corp.* multiple claimants sought to recover damages in excess of the limitation fund pursuant to their saving to suitors rights, that is, outside of the limitation action. This Court reasoned that a singular claimant may pursue a state court claim after filing several stipulations. First, the claimant must stipulate that the admiralty court reserves exclusive jurisdiction to determine all issues related to the shipowner's right to limit liability. Second, the claimant must stipulate that no judgment will be asserted against the shipowner to the extent it exceeds the value of the limitation fund. "But even in multiple-claimant cases, admiralty courts still should allow state court claims to proceed under proper stipulations."[10] Multiple claimants may reduce their claims to the equivalent of a single claim by stipulating to the priority in which their claims will be paid from the limitation fund. Similarly, in *In re Two "R" Drilling Co.*[11] this Court held that a shipowner's rights are protected when multiple claimants file proper stipulations. A deckhand drowned while working for Two "R" Drilling Co., and the widow brought claims on behalf of her children, the deceased, and herself. The plaintiff filed stipulations conceding the right of the shipowner to litigate all issues relating to limitation of liability in a federal forum and agreed not to enforce a judgment in excess of the limitation fund. This Court approved of the procedure and affirmed the district court's ruling to lift the stay, stating, "[w]here the claimant concedes the admiralty court's exclusive jurisdiction to determine all issues

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[10] *Magnolia,* 964 F.2d at 1576 (citing *In re Dammers*, 836 F.2d at 754).

[11] 943 F.2d 576 (5th Cir. 1991).

relating to the limitation of liability, the district court should lift any stay against the state proceeding."[12]

Recently, in *Odeco Oil and Gas Co. v. Bonnette*[13] this Court faced the very issue presently before this Court. Odeco was performing safety drills on a fixed platform in the Gulf of Mexico, when five members of the crew boarded an escape capsule suspended 90 feet above the water. Someone in the capsule pulled the wrong lever, releasing the capsule from the platform; the capsule plunged into the Gulf seriously injuring all of its passengers. Odeco filed an action for a declaratory judgment and, in the alternative, to limit its liability in federal court. The district court issued an order staying any further litigation against Odeco arising from this incident. The claimants filed personal injury suits in state court and filed answers in the district court, requesting that the stay be lifted. The district court lifted the stay, allowing the claimants to pursue their claims in state court.

The *Odeco* court stated, "claims may proceed outside the limitation action (1) if they total less than the value of the vessel, or (2) if the claimants stipulate that the federal court has exclusive jurisdiction over the limitation of liability proceeding and that they will not seek to enforce a greater damage award until the limitation action has been heard by the federal court."[14] This Court reasoned that if the claimants seek to take advantage of their savings to suitors remedies in state court, we must accede to this choice if the shipowner's rights to limit are protected by stipulations.

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[12] *Id.* at 578 (citations omitted).

[13] 4 F.3d 401 (5th Cir. 1993), *cert. denied,* — U.S.—, 114 S.Ct. 1370, 128 L.Ed.2d 47 (1994).

[14] *Odeco,* 4 F.3d at 404.

Appellee contends that we should not lift the stay for two reasons. First, by following *Odeco* and lifting the stay we are creating a third exception to the exclusive jurisdiction of our admiralty courts. The Supreme Court has authorized only two exceptions: the single-claimant-inadequate-fund and multiple-claimant-adequate-fund exceptions. If a claimant proves that it meets one of these exceptions, *then* it must enter into stipulations to protect the shipowner's rights. Entering into stipulations does not in and of itself create an exception.

Though we find this reasoning persuasive it is not in accord with Fifth Circuit law. The case law is clear that is all claimants stipulate that the federal court has exclusive jurisdiction over limitation issues and the claimants will not seek to enforce a greater damage award than the limitation fund, the claimants may proceed outside of the limitation action.[15] While we may have reservations concerning the breadth of this exception[16] and

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[15] *Complaint of Port Arthur Towing M/V MISS CAROLYN*, 42 F.3d 312, 316 (5th Cir. 1995); *Odeco*, 4 F.3d at 404.

[16] But *Odeco* indicates that this should not be the focus of our concern. "If the purpose of the Limitation Act were to accomplish judicial efficiency as well as limitation of liability, this case would clearly call for [a] concursus proceeding. But the Supreme Court explained in *Lake Tankers*, 354 U.S. at 152-53, 77 S.Ct. at 1272-73, that liability may and should be limited *consistent with preserving the claimants' right to proceed in the fora of their choice. Odeco*," 4 F.3d at 404-05 (emphasis added).

the correctness of condoning a multiplicity of law suits,[17] some of which will be duplicitous, we are bound to follow Fifth Circuit law.[18]

Second, Appellee argues that *Odeco* is "entirely different and distinguishable" from the facts presently before this Court. Texaco sought exoneration from or limitation of liability.[19]

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[17] *But see Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546, 550-51 (5th Cir. 1960) (citing *Petition of Texas Co.*, 213 F.2d 479, 482 (2d Cir.) (stating that the "purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equitable fashion, to provide a marshalling of assets–the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full"), *cert. denied*, 348 U.S. 829, 75 S.Ct. 52, 99 L.Ed. 653 (1954)); *Petition of Moran Transp. Corp.*, 185 F.2d 386, 389(2d Cir. 1950) (stating the same), *cert. denied*, 340 U.S. 953, 71 S.Ct. 573, 95 L.Ed. 687 (1951).

[18] *See Port Arthur Towing Co.*, 42 F.3d at 316 (stating that when the shipowner is not exposed to liability beyond the limitation fund the savings to suitors clause controls); *Odeco*, 4 F.3d at 404–05 (quoted *supra*); *Magnolia Marine Transport*, 964 F.2d at 1576 (stating that under proper stipulations, multiple claimants should still be allowed to proceed with the state court claims).

[19] Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims provides that "[t]he complaint may demand exoneration from as well as limitation of liability."Therefore, Texaco may assert its exoneration claim along with its limitation claim. *Accord Providence and New York Steamship Co. v. Hill Mfg. Co.*109 U.S. 578, 595, 3 S.Ct. 379, 390, 27 L.Ed. 1038 (1883) (stating that the questions to be settled in the proceedings are "first, whether the ship or its owners are liable at all...and, secondly, if liable, whether the owners are entitled to a limitation of liability").

Echoing the district court, Appellee contends that the case before us is a "serious exoneration suit" and *Odeco* did not discuss exoneration. Accordingly, *Odeco* should be restricted to suits seeking limitation of liability only.

We find this argument unpersuasive for two reasons. First, shipowners routinely seek exoneration and limitation of liability in the alternative. In fact, Odeco filed a declaratory judgment action requesting the court to determine that the capsule was not a vessel, that the injuries were not caused by the vessel's negligence, and that any action for damages was barred by § 905(a) of the Longshore and Harbor Worker's Compensation Act. Though the *Odeco* court did not label this action as one of exoneration, we must recognize it for what it is. If any court had entered a declaratory judgment on one of these issues, Odeco would have been exonerated. For this reason, we find that "exoneration" was before this Court in *Odeco.* Second, Appellants have agreed to stipulate that the limitation court is not bound by any decisions by other courts on issues relating to limitation of liability *and* exoneration. Therefore, the shipowner's right to limit liability and litigate the issue of exoneration in federal court is protected by stipulation. For these two reasons, we are compelled to follow *Odeco.*

During oral argument Appellants agreed to enter into stipulations that would protect any rights Appellee alleged in the federal court pleadings, including the right to receive exoneration, and agreed to consolidate their suits and litigate them in one state trial. We direct the district court to evaluate these new stipulations, and to consider the following issues and suggestions in determining the adequacy of the stipulations. First, if a direct action claim has been or may be asserted against the underwriters of Texaco and TEPI in state court, then the stipulations *may* include a waiver by Williams and Ellender similarly protecting these insurance carriers from collection of any state court judgment unless and until the federal court's limitation of liability

proceeding determines that Texaco and TEPI were not entitled to either exoneration from or limitation of liability.[20] Second, the district court should determine if any potential derivative actions exist; if so, then the stipulations should cover these as well. Third, the district court should determine if the casualty gave rise to any environmental claims that were timely filed; if so, the stipulations should require joinder of the claimants. If the stipulations cover *all* potential claimants and adequately protect Texaco's right to receive exoneration or to limit liability, then the stay should be lifted, allowing Appellants to pursue their saving to suitors remedies.

We reverse the district court's refusal to lift the stay, and remand this action to the district court to evaluate the adequacy of Appellants' new stipulations consistent with this opinion.

REVERSED and REMANDED.

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[20] We note that "the Act itself affords...underwriters no right of limitation." *Magnolia*, 964 F.2d at 1576. This opinion should not be construed to create a right for underwriters to limit their liability or to take shelter under stipulations protecting the shipowner. Any right to limit an underwriter's liability is purely contractual in nature. "[T]he underwriters are not *entitled* to a stipulation in their favor." *Id.* (emphasis added). We are not requiring the claimants to enter into stipulations protecting the underwriters; however, because the claimants were so willing to enter into *any* stipulation, so as "to take advantage of the perceived magnanimity of...[state] juries", we are suggesting this stipulation. *Odeco*, 4 F.3d at 405.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-30191

TEXACO, INC., as owner, praying for exoneration from and/or limitation of liability, ET AL., ETC.,
Petitioners-Appellees,
versus
PAUL WILLIAMS and HARRISON ELLENDER,
Claimants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 03/21/95), 5 Cir., ( ), ( ) F.3d ( )
(April 25, 1995)

Before REYNALDO G. GARZA, DeMOSS and BENAVIDES, Circuit Judges.

PER CURIAM:

(x) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of

one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

[s]_____
United States Circuit Judge

Judges King and Duhé did not participate in the consideration of the suggestion for rehearing en banc.

CLERK'S NOTE: SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

U.S. Const. art. III., § 2, cl. 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsectin (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freigh then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occa-

sions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

46 U.S.C. § 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

Supplemental Admiralty and Maritime Claims
Rule F. Limitation of Liability

(1) Time for Filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or

abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession the are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day

of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivison (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof.

(7) Insufficiency of Fund or Security. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or

reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the inteerst of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

Supreme Court, U.S.
FILED
JUL 20 1995
CLERK

(2)

No. 94-2071

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TEXACO, INC. and TEXACO EXPLORATION AND PRODUCTION, INC.,

Petitioners,

v.

PAUL WILLIAMS and HARRISON ELLENDER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, HARRISON ELLENDER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit engaged in "judicial legislation," prohibited by this Court in areas where Congress has spoken, when it denied a vessel owner the concursus proceeding mandated in an action filed under the Limitation of Vessel Owner's Liability Act, 46 U.S.C. §181, *et seq.*, thereby rendering a decision in direct conflict with the statute, Supplemental Admiralty Rule F, Supreme Court precedents, and its own appellate precedents.
2. Whether the Fifth Circuit's decision correctly resolved the "recurring and inherent conflict" between the exclusive jurisdiction vested in an admiralty court by the Limitation of Vessel Owner's Liability Act, 46 U.S.C. §181, *et seq.*, and the common law remedies embodied in the Saving to Suitors Clause of 28 U.S.C. §1333 when it abdicated the exclusive jurisdiction of an admiralty court to state courts.

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No. 94-2071

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TEXACO, INC. and TEXACO EXPLORATION AND PRODUCTION, INC.,

Petitioners,

v.

PAUL WILLIAMS and HARRISON ELLENDER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, HARRISON ELLENDER

TO THE HONORABLE SUPREME COURT:

The Respondent, HARRISON ELLENDER, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, Texaco, Inc. and Texaco Exploration and Production, Inc.

STATEMENT OF THE CASE

Respondent, Harrison Ellender, was seriously burned in August of 1993 as a result of a fire and explosion on a barge owned by Texaco, Inc. and operated by Texaco Exploration and Production, Inc. Respondent filed a Jones Act and General Maritime lawsuit in State Court in the 32nd Judicial District Court in and for the Parish of Terrebonne, State of Louisiana, pursuant to the "saving to suitors" clause in 28 U.S.C. §1333.

Texaco Inc. and Texaco Exploration and production, Inc. filed a limitation of liability proceeding in the U.S. District Court for the Eastern District of Louisiana subsequent to Respondent's State Court suit being filed. It also sought exoneration from liability in that proceeding. Respondent and another claimant filed, in the limitation action, claims which exceeded the value of the barge in question.

Respondent, along with the other claimant, then filed a motion to lift the stay that had been issued with the limitation proceeding. Claimants submitted stipulations to protect the vessel owner and operator's right to seek limitation and/or exoneration of liability.

The district court denied the claimants' request to lift the stay and refused to stay the matter pending appeal. The Fifth Circuit Court of Appeal stayed the limitation action pending the appeal and rendered an opinion which reversed the District Court. Claimants' argued that the stipulations provided to the vessel owner and operator in effect converted a multiple claim case into a single claim situation. The Court of Appeal allowed the stay to be lifted if the claimants' stipulations covered *all* potential claimants and adequately protected Texaco's right to seek exoneration or limitation of liability. By taking this

action, the Fifth Circuit resolved the conflict between the rights of the claimants to pursue their remedies under the Saving to Suitors clause in 28 U.S.C. §1333 and at the same time protected and recognized the owner and vessel operator's right to seek exoneration and limitation of liability pursuant to 46 U.S.C. §181, *et seq.*

In its statement of the case, petitioner asserts that "the need for uniformity in the administration and application of maritime law is again before this Court." (p. 3 of Petition for Writ of Certiorari) Respondent has not sought any state remedy other than those afforded it in the Saving to Suitors clause. Unlike *Yamaha Motor Corp. U.S.A. v. Calhoun*, 115 S.Ct. 1998 (1995), Respondent is not seeking to supplement his damage claim by relying on any state law damage remedy. Respondent simply has filed his Jones Act and General Maritime Law claim in State Court as allowed by the Saving to Suitors clause in 28 U.S.C. §1333. There is no issue regarding lack of uniformity of maritime law in this case.

Petitioners also claimed that the Fifth Circuit refused to follow this Court's precedents and its own precedents. This is an incorrect assertion. The Fifth Circuit in fact followed its own precedents set out in *Magnolia Marine Transport v. Laplace Towing Corp*, 964 F.2d 1571 (5th Cir. 1992) and *Odeco Oil and Gas Co. Drilling Division v. Bonnette*, 4 F.3d 401 (5th Cir. 1993). The decision of the Fifth Circuit does not "eviscerate" the Limitation Act and Admiralty Rule F as claimed by Petitioner. To the contrary, the Fifth Circuit made it abundantly clear that it was protecting the ship owner and operator's rights to limitation by preserving the federal court jurisdiction over the limitation action and preventing claimants from raising any limitation issue in the state court proceeding as required by the stipulations.

Finally, the decision does not abdicate the exclusive grant of admiralty jurisdiction. The opinion specifically states "if the stipulations cover *all* potential claimants and adequately protect Texaco's right to receive exoneration or to limit liability, then the stay should be lifted, allowing appellants to pursue their saving to suitors remedies." *Texaco, Inc. v. Williams*, 47 F.3d 765, 770 (5th Cir. 1995) This is not an abdication of admiralty jurisdiction but is actually a protection of it by insuring Texaco's rights to seek limitation and/or exoneration.

SUMMARY OF THE ARGUMENT

The Fifth Circuit in its opinion below did not participate in "judicial legislation." Its decision follows its prior case law as well as the law in the Second, Third, and Eighth Circuits and prior decisions of this Court. It resolved the conflict between the Limitation of Liability Act 46 U.S.C. §181, *et seq.*, and the saving to suitors clause of 28 U.S.C. §1333 in favor of giving effect to both statutes rather than give one party more rights than the other. Claimants have their saving to suitors rights and the vessel owner has its limitation rights.

There was no abdication of admiralty jurisdiction by the Court below. It in fact made it perfectly clear that it was protecting its admiralty jurisdiction by requiring stipulations that would prevent the state court from deciding any limitation issues.

REASONS FOR DENYING THE WRIT

This Court long ago recognized the conflict between the Limitation of Liability Act 46 U.S.C. §181 *et seq.* and the "Saving to Suitors" clause in 28 U.S.C. §1333. In *Langnes v. Green*, 282 U.S. 531; 51 S.Ct. 243 (1931),

a single claimant had filed suit in State Court. The vessel owner filed for limitation pursuant to 46 U.S.C. §181, *et seq.*, and an injunction issued to stay the state court proceeding. The Court recognized that:

> [T]he situation, then, is that one statute gave respondent the right to a common-law remedy, which he properly sought in the state court; and another statute gave petitioner the right to seek a limitation of liability in the federal District Court. 282 U.S. 531, 539-540; 51 S.Ct. 243, 246

It resolved the conlfict by allowing the state court suit to proceed but retained jurisdiction of the limitation action to protect the ship owner's right to limitation. That procedure was likewise followed in *Lake Tankers Corp v. Henn*, 354 U.S. 945; 77 S.Ct. 1421 (1957), where the value of the claims were less than the value of the funds.

The Eighth Circuit followed these guide lines in *Universal Towing Co. v. Barrale*, 595 F.2d 414 (8th Cir. 1979). There, a death claim was filed by the widow of a seaman, and an indemnity claim and a claim for attorney's fees and costs was filed by a third party against the vessel owner. The widow filed a stipulation allowing the claimant for attorney's fees and costs to be paid in priority. The Eighth Circuit determined that this stipulation converted a multiple claim case into a single claimant case which eliminated the need for a concourse. It ordered the District Court to dissolve the injunction unless the vessel owner could demonstrate his right to limit liability would be prejudiced.

The Second Circuit followed this procedure in *Complaint of Dammers and Vanderheide*, 836 F.2d 750 (2nd Cir. 1988). Before the court was a claim for personal injury by a seaman and a claim for loss of con-

sortium by the claimant's wife along with claims of third parties for attorney's fees and costs. Claimants filed stipulations which converted the multiple claims into a single claim case. The stipulations required the claimant to concede the ship owner's right to have the limitation of liability claim tried exclusively in federal court, and protect the ship owner from completing claims in excess of the limitation fund. The Court stated that:

> "as long as the admiralty court can effectively insure that a ship owner will not face liability in excess of the limitation fund, it must take all steps necessary to assure that claimants are allowed to pursue their common law remedies in accordance with the 'saving to suitors' clause." 836 F.2d 750, 759 (2nd Cir. 1988).

The Third Circuit adopted this procedure in *Gorman v. Cerasia*, 2 F.3d 519 (3rd Cir. 1993). There the Court stated that as long as the priority stipulations filed in the District Court insure that the ship owner will not be exposed to competing claims in excess of the limitation fund, the District Court may authorize the parties to proceed with the State Court action.

The Fifth Circuit likewise adopted and approved this procedure in *Magnolia Marine Transport v. Laplace Towing Corp.*, 964 F.2d 1571 (5th Cir. 1992) and *Odeco Oil and Gas Co. Drilling Div. v. Bonnette*, 4 F.3rd 401 (5th Cir. 1993); writ denied 114 S.Ct. 1370 (1994).

The Fifth Circuit in the case before this Court simply followed these precedents. The decision below is not in direct conflict with the prior decision of the Fifth Circuit in *Pershing Auto Rentals, Inc. v. Gaffney*, 279 F.2d 546 (5th Cir. 1960) as alleged by Petitioner. As noted by the Court in *Odeco, Pershing* involved stipulations by *less* than *all* of the claimants. See 4 F.3d 401, 405

FN7 (5th Cir. 1993) In the case before this Court, the only two claimants have joined in and filed the stipulations which protect the ship owner's right to seek limited liability and they have agreed to proceed in the same state court proceeding. The opinion of the court below was not "judicial legislation." It followed the law as set forth in prior Fifth Circuit decisions and followed the procedure adopted by the Supreme Court, the Second, Third, and Eighth Circuits.

The Fifth Circuit did not abdicate its admiralty jurisdiction in favor of state common-law remedies. This argument made by petitioner is unsupported in the opinion as well as the law. The Court retained jurisdiction for the limitation case and made it abundantly clear that no issue in reference to the limitation would be tried or become res judicata by the State Court proceedings.

What the Fifth Circuit did was to protect the right of the ship owner to limitation of liability and the right of the claimants to proceed with their Saving to Suitors action. It reconciled the conflict between these two statutes and protected the rights of all the parties.

Texaco will not be required to defend multiple claims before a jury in multiple courts with a risk of lack of uniformity in the law to be applied to the case. The opinion below required that both claimants file their state court proceedings in the same state court. It also required that they be consolidated and tried in one state trial. The Court allowed the injunction to be lifted only "[i]f the stipulations cover all potential claimants and adequately protect Texaco's right to receive exoneration or to limit liability." 47 F.3d 765, 770 (5th Cir. 1993) That was not abdication but direct protection of the admiralty jurisdiction.

CONCLUSION

Contrary to the allegations made by petitioner, the opinion of the Fifth Circuit below followed prior case law of the Fifth and other circuits as well as this Court. There was no "judicial legislation." There was no abdication of admiralty jurisdiction. The Fifth Circuit made it abundantly clear that it was fully protecting its admiralty jurisdiction by requiring stipulations that would prevent inclusion of limitation issues in the state court proceedings. The procedure used thus fully protected both parties rights under both the Limitation of Liability Act 46 U.S.C. §181, *et seq.*, and the "Saving to Suitors" clause of 28 U.S.C. §1333. For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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